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SERGEANT RAJENDRAN S BALAKRISHNAN

v.

PP

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HIGH COURT MALAYA, PULAU PINANG
MOHD AMIN FIRDAUS JC
[CRIMINAL APPEAL NO: 42A-107-2009]
11 FEBRUARY 2011

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CRIMINAL PROCEDURE: *Sentencing - Corruption - Conviction and sentence - Appeal against - Police investigating officer obtaining money from complainant of case without consideration - Money requested by officer as air fare to return to attend to case - Whether sufficient evidence to sustain conviction - Whether jail term grossly inadequate - Factors considered in enhancing sentence - Penal Code, s. 165*

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The appellant, a sergeant with the Commercial Crimes Department of the Penang Police Headquarters Contingent, was charged in the Sessions Court on two charges under s. 11(a) of the Anti-Corruption Act 1997 ('ACA') and an alternative charge to the second charge under s. 165 of the Penal Code. He was acquitted of the ACA charges but convicted of the alternative charge and sentenced to two months' jail and fined RM10,000 in default eight weeks' jail. The offence was that he had, while being the investigating officer of a cheating case, accepted, without consideration, RM500 from the complainant in that case by having the sum banked into his account. The appellant appealed the decision to the High Court. The complainant in that case, ('Yeoh'), had advertised his Batu Ferringhi house for sale at RM2.4m. He received a call from a man called 'Yeap' saying someone was interested in buying the house. Yeap asked for a commission of RM200,000. In a meeting at a hotel room with Yeap, one Tony and two others, Yeoh handed over the said sum and Yeap and Tony told Yeoh to return to the hotel the next day to see them with the relevant house documents. When he returned the next day, Yeoh found the men were no longer staying at the hotel. Yeoh lodged a police report that he had been cheated. Sometime after the report, Yeoh and his personal assistant happened to see Tony at a petrol kiosk and they apprehended him. Yeoh immediately telephoned the appellant, who was the investigating officer of the case, to tell him about the apprehension but the appellant said he was in Kuala Lumpur. The appellant had then apparently told Yeoh that if he wanted him (the appellant) to return to Penang, Yeoh would have to pay RM500 for the air fare. Yeoh banked in the said amount.

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During the trial, the appellant did not deny the RM500 had been deposited into his account but denied it was done with his knowledge and consent. He said he did not give Yeoh the bank account number as alleged but that the number was written on the whiteboard in his office which Yeoh had noted down when the latter visited his office to enquire about the progress of the case.

Held (affirming the conviction; enhancing the jail term to six months and reducing the fine to RM2,000 in default 2 months' jail):

(1) The sessions court judge had not misdirected herself on the burden of proof, had not failed to consider the defence and had evaluated the overall evidence of the case before arriving at her decision. (para 96)

(2) There was sufficient evidence to affirm the conviction of the appellant for the offence by the trial court. (para 92)

(3) The damning direct evidence of Yeoh's personal assistant concerning the circumstances surrounding the banking-in of the RM500 was not challenged at all by the defence. There was also overwhelming circumstantial evidence to show the appellant had committed the offence. (paras 99, 101 & 105)

(4) The 2-month imprisonment meted out to the appellant was glaringly inadequate regard being had to the serious nature of the crime. Being a law enforcement officer himself, he had breached the law he was appointed to enforce, his action undermined public confidence in the police force and corruption as a whole would deter foreign investors from investing in this country and this will affect the nation's economy. (paras 122, 124-125)

Case(s) referred to:

Adzhaar Ahmad & Anor v. PP [1996] 1 LNS 68 HC ***(refd)***
Baharudin Ahmad v. PP [2010] 3 CLJ 59 HC ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
Chean Siong Guat v. PP [1969] 1 LNS 23 HC ***(refd)***
Davies v. Director of Public Prosecutions HLJ 507 ***(refd)***
Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***
Goh Khiok Phiong v. Regina [1954] 1 LNS 18 HC ***(refd)***
Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***
Kartar Singh & Anor v. Rex [1952] 1 LNS 43 HC ***(refd)***
Khoo Cheng Huat v. PP [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236 HC ***(refd)***
Kuan Ted Fatt v. PP [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 FC ***(refd)***
Msimanga Lesaly v. PP [2005] 1 CLJ 398 CA ***(refd)***
Neoh Ewe Kean lwn. PP [2009] 1 LNS 650 HC ***(refd)***
PP v. Adetunji Adeleye Sule [1993] 3 CLJ 113 SC ***(refd)***
PP v. Dato' Hj Azman Mahalan [2010] 6 CLJ 34 CA ***(refd)***

A *PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC* ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1993] 2 AMR 45 HC ***(refd)***
PP v. Rosman Abdul Wahab [2006] 4 CLJ 615 HC ***(refd)***
Re Soo Leot [1955] 1 LNS 127 HC ***(refd)***
Regina v. WN Hammar [1957] 1 LNS 77 HC ***(refd)***
B *Rosli Supardi v. PP [2002] 3 CLJ 544 CA* ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yan Wing Lee v. PP [1994] 2 CLJ 453 HC ***(refd)***

Legislation referred to:
C Anti-Corruption Act 1997, ss. 11(a), 16, 22(8), 42(3), 44(1)(a)(ii), (2), 45(3)
Criminal Procedure Code, ss. 376(1), 422
Federal Constitution, arts. 145(3), (3A)
Firearms (Increased Penalties) Act 1971, s. 9
Internal Security Act 1960, s. 58(1)
D Penal Code, s. 165

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, p 701

For the accused/appellant - MM Athimulan; M/s Athimulan & Co
E *For the respondent - Janariah Abdul Mutalib; Malaysian Anti Corruption Commission*

Reported by Ashok Kumar

F **JUDGMENT**

Mohd Amin Firdaus JC:

Background Charges

G **[1]** The accused/appellant was charged at the Sessions Court in Georgetown, Penang on two charges under s. 11(a) of the Anti-Corruption Act 1997 (Act 575) and an alternative charge to the second charge under s. 165 of the Penal Code as seen here below:

Pertuduhan Pertama

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Bahawa kamu antara 16hb Julai 2004 hingga 18hb Julai 2004, jam lebih kurang 12.30 tengahari, di Pejabat Penolong Pegawai Penyiasat Jenayah Perdagangan, Ibu Pejabat Kontinjen Pulau Pinang, di Daerah Timur Laut, dalam Negeri Pulau Pinang, sebagai seorang penjawat awam, iaitu Sarjan Polis 105415 yang bertugas di bahagian Siasatan
I Jenayah Perdagangan, Ibu Pejabat Polis Kontinjen Pulau Pinang, telah secara rasuah memperoleh satu suapan, iaitu wang tunai RM700.00 (Ringgit Malaysia Tujuh Ratus) daripada Yeoh Gim Hoay, sebagai satu dorongan untuk kamu melakukan sesuatu yang berhubungan dengan

hal ehwal prinsipal kamu, iaitu wang tunai RM700.00 dikatakan sebagai pembayaran mencuci gambar filem daripada pita video litar kamera berkaitan aduan Polis No. Pulau Tikus/003083/04 dan dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 11(a) Akta Pencegahan Rasuah 1997 (Akta 575) yang boleh dihukum di bawah Seksyen 16 Akta yang sama

Pertuduhan Kedua

Bahawa kamu antara 23hb September 2004, jam lebih kurang 8.21 malam, di Maybank Cawangan Pulau Tikus, di Daerah Timur Laut, dalam Negeri Pulau Pinang sebagai seorang penjawat awam, iaitu Sarjan Polis 105415 yang bertugas di bahagian Siasatan Jenayah Perdagangan, Ibu Pejabat Polis Kontinjen Pulau Pinang, telah secara rasuah memperoleh satu suapan, iaitu wang tunai RM500.00 (Ringgit Malaysia Lima Ratus) daripada Yeoh Gim Hoay yang dimasukkan ke akaun Maybank No. 102090015918, sebagai satu dorongan untuk kamu melakukan sesuatu yang berhubungan dengan hal ehwal prinsipal kamu, iaitu wang tunai RM500.00 dikatakan sebagai tambang kapal terbang untuk kamu balik ke Pulau Pinang daripada Kuala Lumpur demi mempercepatkan sisasatan kes berkaitan aduan Polis No. Pulau Tikus/003083/04 dan dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 11(a) Akta Pencegahan Rasuah 1997 (Akta 575) yang boleh dihukum di bawah Seksyen 16 Akta yang sama.

Pertuduhan Pilihan kepada Pertuduhan Kedua

Bahawa kamu pada 23hb September 2004, jam lebih kurang 8.21 malam, di Maybank Cawangan Pulau Tikus, di Dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, sebagai seorang penjawat awam iaitu Sarjan Polis 105415 yang bertugas di bahagian Siasatan Jenayah Perdagangan, Ibu Pejabat Polis Kontinjen Pulau Pinang, telah menerima satu barangan berharga tanpa balasan iaitu wang tunai RM500.00 (Ringgit Malaysia Lima Ratus) daripada Yeoh Gim Hoay secara memasukkan wang tunai RM500.00 ke akaun Maybank No. 102090015918 kamu, iaitu Yeoh Gim Hoay adalah pengadu dalam kes siasatan berkaitan aduan Polis No. Pulau Tikus/003083/04 yang kamu merupakan pegawai penyiasat dan dengan itu, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 165 Kanun Keseksaan.

[2] The appellant did not plead guilty to all the three charges on 27 April 2009 at the Sessions Court and claimed trial. At the end of the prosecution case on 30 September 2009, the learned Sessions Court judge found the accused not guilty of the two charges against him under s. 11(a) of the Anti-Corruption Act 1997 (Act 575) and punishable under s. 16 of the same Act.

[3] Instead, she found that a *prima facie* case had been made out against the accused under the alternative charge to the second charge and called for his defence to be entered.

[4] On 27 October 2009, the learned Sessions Court judge found that the accused failed to raise a reasonable doubt on the prosecution case and found him guilty of the said alternative charge and convicted him.

[5] After hearing his mitigation, the Sessions Court sentenced him to two months imprisonment beginning from 27 October 2009 and fined him RM10,000, in default of payment, he was to serve eight weeks imprisonment.

Appeal To The High Court

[6] The High Court heard the appeal against the conviction and sentence meted out to the accused/appellant by the Sessions Court on 27 October 2010. On 22 November 2010, the High Court announced its decision.

[7] After analyzing and weighing the overall evidence in relation to the facts of the case as well as the arguments of both the prosecution/ respondent and the defence/appellant, this court affirmed the said conviction but enhanced the custodial sentence from two month imprisonment to six month imprisonment and reduced the fine from RM10,000 in default, eight week imprisonment to RM2,000 in default of payment, two month imprisonment.

[8] The accused/appellant now appeals against the conviction and sentence of this appellate court.

Facts Of The Case

[9] In the month of July 2004, the complainant of this case named Yeoh Gim Hoay (PW2), also known as Vincent, a housing developer, advertised his house at Batu Ferringhi for sale at RM2.4 million. On 6 July 2004, one man called "Mr Yeap" contacted PW1 telling him that someone was interested to buy the house. Later in the same month of July 2004, one man called "Tony" told PW2 that he wanted to buy the house.

[10] PW2 said that Yeap asked for a commission of RM200,000 and subsequently PW2 together with his personal assistant one Azmi bin Mohamed Aziz (PW1) went to a hotel in Georgetown where PW2 met Tony and Yeap in their hotel room. PW1 did not go into the hotel room. PW2 and PW1 then went to a bank to withdraw a sum of RM200,000 the same day and after the withdrawal, they returned to the hotel.

[11] Returning to the hotel, PW2 alone without PW1 went into the hotel room again where he met Tony, Yeap and two more other persons called "Chew" and "Phillip." Inside the hotel room, PW2 handed over the sum of RM200,000 and Yeap together with Tony asked PW2 to come back to the hotel the next day to see them with the relevant house documents. The following day, when PW2 went back to the hotel, the four men were no longer staying there. PW2 then lodged a police report that the four men had cheated him.

[12] On 23 September 2004 at about 12.30pm, PW1 and PW2 stumbled upon Tony at the Shell Petrol Station on Penang Road and they straightaway apprehended him. The appellant Sergeant Rajendran a/l Balakrishnan (SD1) was assigned to be the investigating officer of this cheating case reported by PW2. PW2 immediately telephoned the appellant to inform him about the incident who told PW2 that he was then in Kuala Lumpur but he would call one L/Cpl Muniandy a/l Narayanan or Andy (PW6) to arrest Tony and take him to the Dato' Keramat Police Station.

[13] According to PW2, "OKT told me if I want him to come back, I have to pay RM500 for air ticket. I have to bank in to his account. He gave me the account number. I wrote on a piece of name card. He told me through the phone call he made to me."

[14] Subsequently at night around 8pm the very same day, PW2 and PW1 went to Maybank at Pulau Tikus to bank the sum of RM500 into the appellant's account.

[15] On the following day that is 24 September 2004 at about 10.30pm, the appellant telephoned PW2 to fetch him from the Bayan Lepas Airport. While inside the car taking the appellant to dinner at the Coffee House at Hotel City Bay View and before dropping him home, the appellant asked for the bank slip recording the sum of RM500 sent to him through the Auto Teller Machine but PW2 told him that he kept the original slip at his office. The following day, PW2 handed over the original slip to the appellant and photocopied one for his own keeping.

[16] The appellant did not deny that the sum of RM500 had been deposited into his Maybank account but denied that it was done with his knowledge and consent. He did not give his bank account number to PW2 as claimed, instead PW2 noted down his account number which he had written on the whiteboard in his office when PW2 visited him on a number of occasions to enquire about the progress of his case. The appellant claimed that he wrote the account number for the purpose of making his travel claims because he could not remember the many digits. On some occasions he was not in the room when PW2 came.

A **Issue**

[17] Whether or not the cash sum of RM500 was deposited into the bank account of the appellant by the complainant of the case that is Yeoh Gim Hoay (PW2) with the knowledge and consent of the former?

B **Parties' Contentions**

Appellant

Relation Between s. 165 Of The Penal Code And s. 11(a) Of The Anti Corruption Act 1997 (Act 575)

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[18] The learned counsel contended that as the learned trial judge had found the appellant was not guilty of the two charges under s. 11(a) of the Anti Corruption Act 1997, he was also entitled to be found innocent of the charge under s. 165 of the Penal Code. This is because the Penal D Code offence and the two corruption charges are so intermingled in regard to law and evidence that it is impossible to separate them.

[19] He further argued that a witness cannot be regarded as worthy of credit at one moment and untrustworthy at another and cited the following cases to support his argument:

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Khoo Cheng Huat v. PP [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236;

Goh Ah Yew v. PP [1948] 1 LNS 13

F *Adzhaar Ahmad & Anor v. PP* [1996] 1 LNS 68

PW2 Was An Accomplice

[20] The learned trial judge had failed to consider PW2 as an accomplice and failed to warn herself of the danger of convicting on the G uncorroborated evidence of PW2.

[21] She also did not warn herself that as no reliance could be placed on those parts of the evidence of PW1 and PW2 relating to the corruption charges which reflected the innocence of the appellant and H therefore to what extent that she could rely on such evidence in so far as it related to the alternative charge under s. 165 of the Penal Code.

[22] The credibility of both PW1 and PW2 are at stake especially when PW2 had made numerous contradictions in his evidence regarding the sale transaction of his house, his first meeting with the appellant and I the closed circuit television tape.

Burden Of Proof

[23] The learned trial judge had misdirected herself with regard to the burden of proof at the end of the trial by placing the burden of proof tacitly on the appellant.

Failure To Consider The Defence

[24] The learned Sessions Court judge had failed to consider carefully on whether the defence was capable of raising a reasonable doubt on the prosecution case. She failed to consider exhs. D20, the statement of the appellant recorded under s. 45(3) of Act 575 and D20 A, a statement recorded under s. 22(8) of the same Act. This is a serious misdirection by way of non-direction.

[25] She failed to view the total evidence from all angles objectively and did not consider evidence favourable to the appellant such as the testimonies of DSP Khalid bin Munap (PW7), Head of the Investigation for Commercial Crimes at the Penang Police Contingent Headquarters, the superior officer of the appellant and Farizad Khan bin MSM Mohamed Alim (PW8), the officer from Celcom Malaysia Sdn Bhd.

[26] The defence was not a mere denial as said by the learned Sessions Court judge but one which carried reasonable and plausible explanation.

[27] He referred again to *Adzhaar Ahmad v. PP* [1996] 1 LNS 68.

Motive

[28] The learned Sessions Court judge did not consider the motive of PW2 against the totality of the evidence thus resulting in a wrong assessment as to his credibility.

Rebuttal Evidence

[29] The learned trial judge did not apply her mind to the issue of rebuttal evidence when one Sgt Ramli was not called as a rebuttal witness. Sgt Ramli was the driver who drove one C/Insp Jasmani and the appellant to Putrajaya when PW2 telephoned the appellant while he was in the police vehicle talking with PW2 on sending L/Cpl Muniandy or Andy to arrest Tony at the Shell Petrol Station and the fact that he did not ask for the RM500 for the flight fare in order to hurry back to Penang purportedly on the request of PW2.

[30] All in all, the prosecution had not proved its case beyond reasonable doubt and the appellant should not be found guilty of the alternative charge against him and he ought to be acquitted and discharged.

A **Respondent Sound Decision**

[31] The respondent (learned deputy public prosecutor) argued that the learned trial judge had taken into consideration all the facts and the relevant law of the case and given her reasons as seen in her grounds of judgment from p. 106 to 117 in the Appeal Record to justify her decision. Thus she had correctly convicted the appellant who had not raised a reasonable doubt on the case for the prosecution.

Ingredients Of The Offence

[32] The ingredients of the offence had been proven and the defence had not cast a reasonable doubt upon the prosecution case.

[33] For s. 165 of the Penal Code, the ingredient of the offence that the appellant is a public servant had been fulfilled by the evidence of PW3, ASP Kamruzaman bin Zakaria, the administrative officer who was in charge of the service records of all the police personnel that the appellant is a police officer holding the rank of sergeant at the Commercial Crimes Department at the Penang Police Headquarters Contingent.

[34] The testimonies of PW1, PW2 and Rosma bt Mat (PW4) the Maybank officer from Mergong Branch, Kedah, who testified that the bank account number 102090015918 belongs to the appellant and on the 23rd of September 2004, a sum of RM500 was deposited through the ATM machine into this account at its Pulau Tikus Branch in Penang and Ong Lay Sim (PW5) the Branch Manager of Maybank Pulau Tikus confirmed the transaction.

[35] The appellant only denied of having given his bank account number to PW2 and claimed that he did not know of the said deposit.

[36] All these witnesses proved that the appellant had received this cash sum of RM500 from PW2 without consideration in connection with his official duty related to the police report made by the complainant (PW2).

[37] The respondent contended that the appellant had knowledge of this transaction relating to his official function with PW2. Section 42(3) of Act 575 raised the presumption that the appellant had such knowledge. PW2 had testified that the appellant was the investigating officer in the cheating case he reported to the police and PW7 verified this fact.

[38] In *PP v. Rosman Abdul Wahab* [2006] 4 CLJ 615, Low Hup Bing J (as he then was) held that in order to establish a *prima facie* case, the prosecution must prove that the accused is a public servant and that he has accepted a valuable thing without consideration. Once

these two essential ingredients have been proven by the prosecution, then the presumption under s. 42(3) of Act 575 would arise to show knowledge.

[39] The respondent cited the case of *Baharudin Ahmad v. PP* [2010] 3 CLJ 59 to support her contention that a *prima facie* case had been made out against the appellant and she added that the appellant had not given back the sum of RM500 to PW2. It only strengthens the inference that the appellant had received the said sum without any consideration.

Credibility Of PW1 And PW2

[40] The appellant is attempting to argue that after the two charges under s. 11(a) of Act 575 had not been proven, then the credibility of PW2 and PW3 had been affected is not true.

[41] The respondent referred to the cases of *Yan Wing Lee v. PP* [1994] 2 CLJ 453 and *Chean Siong Guat v. PP* [1969] 1 LNS 23 which held that there will always be discrepancies in the evidence of witnesses as no two persons can describe the same thing in exactly the same way. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is competent to accept one part of the testimony and reject the other.

[42] The listed contradictions touching on who was the buyer of the advertised house; who actually asked for the RM200,000 commission and when was this particular sum withdrew from the bank by PW2; what was real purchase price for the said house; was the transaction of the said house carried out with diligence as PW2 is a housing developer and so forth as put forward by the learned appellant's counsel in his outline of submission related to the cheating case lodged by PW2 are not relevant to the alternative charge to the second charge.

[43] What is of significance is that there was no contradiction between the evidence of PW1 and PW2 in regard to the sum of RM500 being deposited into the bank account of the appellant without consideration from him.

[44] Thus the credibility of both PW1 and PW2 stood intact.

Burden Of Proof

[45] The learned trial judge had carried out a maximum evaluation on the total prosecution evidence when she found that a *prima facie* case had been established by the prosecution against the appellant although she did not make such a specific findings.

[46] The case of *Neoh Ewe Kean lwn. PP* [2009] 1 LNS 650 (Penang High Court Criminal Appeal No. 42-176-2008) was cited that the learned judicial commissioner (YA Yaacob Sam, as he then was) in that appeal held that even though the lower court trial judge did not make specific findings that the prosecution had proved its case beyond reasonable doubt, nevertheless, the conviction was upheld. He further viewed that such a failure did not occasion a miscarriage of justice and it was curable under s. 422 of the Criminal Procedure Code.

[47] The Federal Court case in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, a full bench of this court held that in an exceptional case where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection as to the standard of proof.

Exhibit D20 A

[48] This is a statement given by the appellant and recorded under s. 22(8) of Act 575 and tendered in the court to support the defence of the appellant that he did not give his bank account number to PW2 while on the way to Putrajaya.

[49] The learned trial judge had taken note of this in her grounds of judgment. C/Insp Jasmini bin Sarbini (SD2) had said that sometimes he could not hear clearly the telephone conversation between the appellant and PW2.

[50] Hence the defence had not raised a reasonable doubt on the case for the prosecution. There was no plausible explanation for PW2 to take down the bank account number of the appellant.

[51] The respondent cited the case of *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233:

> ... A purely exculpatory or self serving statement is not evidence of the facts stated although it may be admitted to show the reaction or attitude of the accused at the time he made it. In considering whether there was a case to answer, the trial judge ought not to take into account such a statement as the basis for finding an order of acquittal and discharge.

[52] In *PP v. Adetunji Adeleye Sule* [1993] 3 CLJ 113:

> Furthermore, a purely exculpatory statement made by the respondent out of court is evidence at the trial that the respondent made the statement and of his reaction but it is not evidence of the facts stated.

[53] *Msimanga Lesaly v. PP* [2005] 1 CLJ 398:

> An the mere fact that an accused's evidence is consistent with his earlier out of court statement does not require a court in every case to hold that he or she is a witness of truth. Were it otherwise, the assessment of oral testimony would become a robotic function ...."

[54] *Ratanlal & Dhirajlal's Law of Crimes* on p. 701:

> s. 165 Penal Code
>
> Under this section (Section 165 of the Penal Code) the question of motive or reward is wholly immaterial and the acceptance of a valuable thing without consideration or with inadequate consideration from a person who has or likely to have any business to be transacted, is forbidden because though not taken as a motive or reward for showing any official favour, it is likely to influence the public servant to show official favour to the person giving such valuable thing.

PW2 - An Accomplice?

[55] Section 44 of Act 575 applies. Assuming even if the court were to view that PW2 was an accomplice, the respondent cited the Court of Appeal case in *PP v. Dato' Hj Azman Mahalan* [2010] 6 CLJ 34 which held: "Under s. 133 of the Evidence Act 1950 (apart from s. 44(2) of Act 575), an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice ..."

[56] Therefore, the conviction and sentence of the Sessions Court against the appellant should be upheld.

Findings

Intermingling Of Offences

[57] The argument of the learned counsel that as the appellant was not found guilty under s. 11(a) of Act 575, therefore the trial court should have also not found him guilty under s. 165 of the Penal Code because the corruption offences and the Penal Code offence are so intermingled in relation to law and evidence making it impossible to separate them is a spurious argument.

[58] To draw an analogy between the corruption offences and the Penal Code offences and the offences of dangerous drug trafficking and possession under the Dangerous Drugs Trafficking Act 1952, (although here it is only one Act) with all due respect to the learned counsel, is he trying to say that just because a charge under trafficking cannot be proven against the accused, therefore a charge for possession cannot be sustained against the accused as both offences cannot be separated.

[59] It is common knowledge that in drug trafficking trials, there were a number of occasions where the prosecution had reduced the charge of trafficking to one merely of possession.

[60] By the same token, if a charge under s. 58(1) of the Internal Security Act 1960 (Act 82) let us say that for unlawful possession of firearm, cannot be proven against an accused, is it true that an alternative charge under s. 9 of the Firearms (Increased Penalties) Act 1971 (Act 37) also cannot be indicted against the accused.

[61] In relation to this particular subject matter, it is also noteworthy to bear in mind that the Attorney General has the constitutional right under art. 145(3) and (3A) of the Federal Constitution and s. 376(1) of the Criminal Procedure Code to determine what charge and which court that the accused person should face and be tried. One cannot detach from this very fact, thus the argument of the learned counsel that the alternative charge under s. 165 of the Penal Code and the charges under s. 11(a) of Act 575 are purportedly so intertwined so as to make it impossible to separate them is baseless.

[62] Section 58(1) of Act 82 laid down:

> Any person who in any security area consorts with or is found in the company of another person who is carrying or has in his possession or under his control any firearm, ammunition or explosive in contravention of Section 57, in circumstances which raise a reasonable presumption that he intends, or is about, to act ... shall be guilty of an offence ...

[63] Section 9 of Act 37 stated that:

> Any person who consorts with, or is found in the company of, another person who is in unlawful possession of a firearm in circumstances which raise a reasonable presumption that he knew that such other person was in unlawful possession of the firearm, shall, unless he proves that he had reasonable grounds for believing that such other person was not in unlawful possession of the firearm, be punished ...

[64] Therefore, it is the humble opinion of this court that what the learned counsel had canvassed does not hold water.

Was The Complainant Of The Case PW2 An Accomplice?

[65] Who is an accomplice?

[66] In the *New Oxford Dictionary of English 1998*, it defines an accomplice as a person who helps another commit a crime.

[67] In *Davies v. Director of Public Prosecutions* HLJ 507, the House of Lords held that there is in the authorities no formal definition of the term "accomplice." It viewed that persons who are participes criminis in respect of the actual crime charged are accomplices.

[68] In the Criminal Court of Appeal case in *Goh Khiok Phiong v. Regina* [1954] 1 LNS 18 (Kuching), Per Smith J:

> In deciding whether a witness should be treated as an accomplice, the trial judge should ask himself this question: 'Is there any evidence upon which I can properly rule that the witness was a participant in the offence?'

[69] The learned judge referred to the judgment of Simonds LC in *Davies v. Director of Public Prosecutions*.

[70] This principle of law was also adopted by the cases in *Re Soo Leot* [1955] 1 LNS 127 (Buhagiar J); Federal Court in *Kuan Ted Fatt v. PP* [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 and *PP v. Mohd Jamil Yahya & Anor* [1993] 2 AMR 45 HC.

[71] In *Goh Ah Yew v. PP* [1948] 1 LNS 13, the Criminal Appellate Court (Per: Spenser-Wilkinson) held that a person who concurs in the criminal designs for a certain time is an accomplice.

[72] Guided by these authorities, the court finds that PW2 was not an accomplice based on the facts of the case.

[73] This court also opines that PW2 was not an accomplice by virtue of s. 44(1)(a)(ii) and (2) of Act 575.

[74] Section 44(1):

> Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act:
>
> (a) No witness shall be regarded as an accomplice by reason of only such witness having:
>
> (i)
>
> (ii) given, promised, offered, or agreed to give any gratification; or
>
> (iii)
>
> (b)
>
> (c)

A (2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgement to the need to warn itself against the danger of convicting on such
B evidence.

[75] Assuming for a moment that PW2 was an accomplice, the Court of Appeal case in *Dato Azman Mahalan v. PP* cited by the respondent had held that an accomplice shall still be a competent witness against an
C accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Burden Of Proof

[76] The argument that the learned trial judge did not apply the
D correct burden of proof but instead tacitly shifted the burden upon the accused at the end of the defence case is without merit as after scrutinizing her whole grounds of written judgement, this court does not agree with the contention. There was sufficient evidence to connect the appellant with the offence under s. 165 of the Penal Code which the
E court will delve into it at a later stage here.

[77] On the contrary, before finding a *prima facie* case against the appellant, the learned trial judge had stated in her grounds of judgment on p. 112:

F Secara keseluruhannya saya dapati bahawa pihak pendakwa telah berjaya membuktikan kes *prima facie* bagi tindakan ke atas OKT. Dengan itu saya perintahkan OKT untuk membela diri bagi pertuduhan pilihan kepada tuduhan kedua keatas OKT.

[78] At the end of the defence case, she stated:

G Berdasarkan alasan-alasan saya di atas saya dapati bahawa OKT gagal menimbulkan sebarang keraguan ke atas kes pendakwa. Maka dengan itu, saya dapati OKT bersalah dan disabitkan bagi pertuduhan pilihan ke atas beliau.

H **[79]** Although she did not state specifically that the prosecution had proved its case beyond reasonable doubt, nevertheless it is implicit in her findings that she was aware of the burden of proof to be borne by the prosecution.

[80] In the cited Court of Appeal case in *Rosli Supardi v. PP* [2002]
I 3 CLJ 544, it was even held that a misdirection on the standard of proof will not occasion any failure of justice provided there is sufficient proof to establish the guilt of the accused.

Exhibits D20 and D20 A

[81] First and foremost, it is to be noted that basically, exh. D20 is not relevant to the alternative charge to the second charge under s. 165 of the Penal Code as it relates to the charges under s. 11(a) of Act 575.

[82] What is the evidential value of D20 A?

[83] This court is of the opinion that whether the statement of the accused recorded under s. 22(8) of Act 575 is exculpatory must be seen in the context of the case for the defence.

[84] During the recording session, *inter alia*, two crucial questions were posed to the appellant as seen here:

> Q: Adakah semasa perbualan telefon antara kamu dengan Vincent (PW 2), kamu ada memberikan apa-apa nombor akaun bank kamu kepada beliau?
>
> Tiada. Saya langsung tidak cakap berkaitan nombor akaun bank kepada beliau.
>
> [Saksi dirujuk kapada kad perniagaan "Sri Melor Consultants" yang bertulisan warna hitam di belakang "Sjn Rajan A/C 10209001 5918]
>
> Saya tidak ada pengetahuan mengenai kad ini. Tulisan di belakang kad ada tertulis nama Sjn Rajan dan ada tertulis nombor akaun bank saya di Maybank. Tulisan di belakang kad bukan tulisan saya. Saya tidak tahu tulisan siapa.
>
> Q: Kamu dikatakan pada 23/9/04 lebih kurang jam 12.30 tengah hari semasa kamu berbual dalam telefon dengan Vincent telah memberitahu nombor akaun kamu di Maybank 102090015918 kepada Vincent untuk masukkan wang sebanyak RM 500.00 dalam akaun kamu sebagai tambang kapal terbang untuk kamu balik dari KL ke Pulau Pinang. Apa yang hendak kamu katakan?
>
> Saya tidak pernah memberikan nombor akaun Maybank saya kepada beliau dan saya tidak pernah minta wang daripada beliau. Saya telah menggunakan wang saya sendiri untuk tambang kapal terbang ini. Pada masa itu saya dalam perjalanan ke Putrajaya bersama C/Insp Jasmani dan Sjn Ramli ada bersama saya.
>
> In *Tang Tuck Wah v. PP* [1991] 2 MLJ 404 (Sinnathuray J) referring to the Criminal Court of Appeal case in *PP v. Chan Kim Choy* [1991] 1 MLJ 260 (S'pore), viewed that a court is entitled to consider the whole of the evidence before him, to treat the inculpatory parts of the appellant's statements as containing matters of truth, and to reject his explanations he gave favourable to himself.

[85] The court does not accord much probative value to exh. D20 A because it was recorded under investigation and it was self-serving. It would be otherwise, if not recorded under investigation as regard to ordinary human conduct, the court is aware that self preservation is nature's first law of instinct.

[86] Although D20 A was not specifically referred to in the grounds of judgment by the learned trial judge, nonetheless, this court finds that there was sufficient evidence to link the appellant with the offence.

Motive

[87] Although PW2 was not happy with the police investigation done by the appellant as admitted by him, this court finds that there was no motive on the part of PW2 to put the appellant in trouble. If he had harboured such an intention, he would have notified the Badan Pencegah Rasuah beforehand that the appellant was asking for the RM500 flight fare in order for them to set up a trap to snare the appellant.

[88] PW2 testified that the appellant would see the deputy public prosecutor and whatever the decision, the appellant would inform him but there was no answer from the appellant. PW2 himself then went to see the deputy public prosecutor in question and according to PW2, the latter told him that the appellant released Tony. When he asked appellant on why he was not informed about it, the appellant told him that it was his superior officer ASP Shanmugam (PW9) who ordered the release.

[89] On the same day, PW2 went to see the Chief Police Officer (CPO) of the State complaining to him that he was not happy with the investigation carried out by the appellant. The CPO then advised him to make a police report. PW2 emphasised that he did not divulge to the deputy public prosecutor and the CPO that the appellant had already taken the sums of RM500 and RM700 from him.

[90] PW2 said that the police did not inform him that there was no case against the appellant.

[91] From the facts, the court can infer that out of sheer frustration and exasperation, PW2 then complained to the Badan Pencegah Rasuah and there was no element of malice in the complaint. There was no motive to put the appellant in trouble. On the contrary, there was a basis for PW2 to make such a complaint looking at the chain of events that had transpired.

Sufficient Evidence

[92] The court finds that there is sufficient evidence to affirm the conviction of the appellant for the offence by the trial court.

[93] The ingredients of the offence were proven by the prosecution as alluded to earlier by them. SP3 had given evidence that the appellant is a public servant.

[94] The amount of RM500 was given without any consideration as seen from the evidence of PW2. In fact as pointed out by the learned deputy public prosecutor for the respondent, this sum of money was never repaid to PW2 at all.

ID 4 (The Maybank Slip For The Deposit Of The Sum Of RM500)

[95] The learned counsel had argued that the learned trial judge had considered ID4 which is inadmissible and highly prejudicial to the appellant. Although she had acknowledged that ID4 was not admissible as an exhibit, nonetheless, she had reasoned out in her grounds of judgment that the said sum had been deposited without even taken ID4 into consideration.

[96] Summing up, the court finds that the learned Sessions Court judge had not misdirected herself on the burden of proof, had not failed to consider the defence and had evaluated the overall evidence of the case before arriving at her decision.

[97] This court had considered all aspects of the written and oral submissions given by the learned counsel for the defence and if some of them were not delved into, either the court finds them to overlap or insignificant.

[98] As an appeal is also a rehearing, this court will now focus on the other relevant evidence which go to support the decision of the learned trial judge.

Direct Evidence

[99] The direct evidence of PW1, Azmi bin Mohamed Aziz, shows that PW2 and he had gone to Maybank located at Pulau Tikus, had on 23 September 2004 to bank the sum of RM500 into the bank account of the appellant. PW1 himself deposited the said amount of money into the ATM machine at 8.21pm.

[100] During the examination-in-chief, PW1 gave evidence as follows:

> Pada petang itu, Mr Yeoh ajak saya ke Maybank Pulau Tikus untuk beliau bank in duit ke akaun Sjn Rajan. Jumlah di bank in RM500.00. Wang itu untuk tambang kapal terbang untuk OKT pulang segera dari Kuala Lumpur ke Penang.

> Sekarang saya sedang pandu kereta, saya dengar perbualan antara Encik Yeoh (PW2) dan OKT tentang wang RM500.00. Kami ke Maybank Pulau Tikus untuk bank in duit. Encik Yeoh bank in duit dengan cara beri nombor akaun OKT dan saya sendiri masukkan duit melalui mesin ATM. Encik Yeoh berdiri di tepi saya. Wang tunai saya dapati dari Encik Yeoh. Nombor akaun OKT dicatit oleh Encik Yeoh di atas sekeping name card dan kemudian di berikan pada saya." [Appeal Record Jilid 1; page 28; paragraphs B and C]

[101] This piece of damning evidence against the appellant was not challenged at all by the defence. Hence, it is settled law that a failure of the defence to cross-examine the prosecution witness on a crucial part of the case will amount to an acceptance of the witness's testimony."

[102] Please see the Federal Court case in *Wong Swee Chin v. PP* [1980] 1 LNS 138.

[103] In respect of his evidence, the court is aware that PW1 is the personal assistant to PW 1 and having sifted all his evidence, it does not have any reason to doubt his credibility.

[104] In *Balasingham v. PP* [1959] 1 LNS 8; Per Ismail Khan J:

> There is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

Circumstantial Evidence

[105] The court finds that there is overwhelming circumstantial evidence to show that the appellant had committed the offence charged.

[106] The court realizes that for a party to depend on circumstantial evidence, the burden to prove his case is indeed a heavy one.

[107] In *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130, the Federal Court referred to *Kartar Singh & Anor v. Rex* [1952] 1 LNS 43, which held that:

> The evidence (circumstantial) must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If there is anything less than this, it is no case at all.

[108] In the Supreme Court case in *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, it ruled that:

> It is trite law that where the prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it, then that will not be sufficient.

[109] There is consistency of events in this case to support the evidence of PW2 that the appellant had indeed committed the offence. There is indisputable evidence that PW1 and PW2 caught Tony on 23 September 2004 and asked the appellant for his help but he happened to be in Kuala Lumpur at that time.

[110] The appellant had vigorously refuted that he had given his bank account number to PW2 to enable the latter to bank the amount of RM500 into his account to pay for his air fare in order for him to go back to Penang. The appellant contended vehemently that PW2 had noted down his bank account number written on the whiteboard in his office when the latter visited him and he was not in the office.

[111] On 23 September 2004, at 8.21pm, the said sum was deposited into the bank account of the appellant. Why was the urgency for PW2 to do so? There was no reasonable explanation for his action unless it was done at the bidding of the appellant.

[112] On 24 September 2004 the following day at about 10.30pm, PW1 and PW2 went to the Penang Bayan Lepas Airport to fetch the appellant on his request. On the way to dinner, the appellant asked for the original bank slip showing the deposit of the said amount of RM500. PW2 did not have with him the original one that night and only gave it to the appellant the next day but he photocopied one for himself.

[113] The court finds the evidence of PW2 to be reasonable and there is no reason to disbelieve it.

[114] The appellant denied strongly that he had given his bank account number to PW2 and had no knowledge and had not given his consent to the latter depositing RM500 into his account.

[115] Nevertheless, the appellant did not dispute that the sum of RM500 was deposited into his bank account.

Is The Evidence Of The Appellant Credible When He Denied Having Given His Bank Account Number To PW2?

[116] The court doubts the claim of the appellant that PW2 had jotted down his bank account number which he had written on the whiteboard in his office room. According to the appellant, it was done for the purpose of his travel claims as there are many digits which he could not remember.

[117] The appellant did not need to openly display his account numbers in such a manner, a reasonable and prudent man would have noted it down in his diary, notebook or even entered it into his handphone.

[118] It is common knowledge that the bank account number of a person is not only personal but also highly confidential, if it comes into the knowledge of an unscrupulous person, it can be manipulated to siphon out the owner's money and this is not a remote possibility when considering the present era of modern technology, leaving alone the question of collusion with inside help from the bank concerned.

[119] This very fact is recognized by all the banks when we use the Auto Teller Machine; our bank account numbers are not displaced fully on the bank slips.

As A Police Investigator For Commercial Crimes, The Appellant Being An Experienced Officer, With The Rank Of Sergeant Ought To Be Aware Of The Confidentiality Of His Own Bank Account And Not Display It Openly As Claimed In His Office As It Can Be Exploited By A Dishonest Party

[120] If true, it must be written there for some other oblique motive.

The court verily believes that the claim of the appellant that his bank account number was written on the whiteboard is not true at all. C/Insp Jasmani bin Sarbini (SD2), the immediate officer of the appellant who testified in cross-examination:

> Jika ada perbincangan, saya akan panggil OKT dan ia datang ke bilik saya.
>
> Ada masa bila ada urusan rasmi, saya pergi dan masuk ke pejabat OKT. Dalam masa seminggu, saya banyak kali ke bilik OKT. Bila saya masuk ke bilik OKT, saya dapati lihat I.P, whiteboard dan peralatan pejabat.
>
> Di atas whiteboard OKT, saya hanya nampak catitan nombor kes beliau.

[121] From the testimony of SD2, the witness for the appellant, it is thus crystal clear that no such bank account numbers were ever written on the whiteboard.

[122] During re-examination, probably realizing the damage done to his client's case, the appellant, the learned defence counsel made a feeble attempt to restore his credibility and SD2 was given a second bite at the cherry and he answered:

> Di atas whiteboard di pejabat OKT, ada catitan lain ie, angka selain dari nombor case.

[123] In any event, it was a very general answer without even alluding specifically to any bank account number.

[124] There was not a shred of evidence ever adduced by the appellant throughout the trial that the account numbers were written together with his name and the name of his bank on the whiteboard.

Without Such Important Details, If What The Appellant Had Claimed Were True, Then How Did PW2 Know That The Particular Bank Account Numbers Belonged To The Appellant And How Did He Know Which Bank To Deposit The Said Sum Of RM500?

[125] Therefore, the court affirmed the conviction of the appellant but varied the custodial sentence for the following reasons:

(a) The appellant himself being a law enforcement officer had breached the law which he was appointed by the government to enforce.

(b) Corruption is a heinous crime which when committed by a member of the police force tends to undermine the public confidence in the force.

(c) Corruption as a whole in any segment of a society will also deter foreign investors from investing in the country and this in turn will affect the economy of the country.

(d) The two month imprisonment meted out to the appellant is glaringly inadequate regard being to the serious nature of the crime committed by the appellant. In *Regina v. WN Hammar* [1957] 1 LNS 77 HC, it was held that "punishment which amounts to a pin prick does not deter."

Thus the court views that the custodial sentence is fair and not manifestly excessive.